BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTON J. DVORAK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,039,787
FEDEX GROUND PACKAGE SYSTEM, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent appeals the February 5, 2009, Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts (ALJ). Claimant was awarded medical treatment for the injury to his right shoulder after the ALJ determined that claimant's current need for medical treatment is the result of the injury suffered by claimant when he fell on March 26, 2008, while working for respondent.

Claimant appeared by his attorney, Michael J. Joshi of Lenexa, Kansas. Respondent appeared by its attorney, Wade A. Dorothy of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held February 5, 2009, with attachments; and the documents filed of record in this matter.

ISSUE

Is claimant's current need for medical and surgical treatment the result of the accident which occurred on March 26, 2008, while working for respondent, or is it a natural consequence of the prior shoulder injuries suffered by claimant over a period of several years?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be affirmed.

Claimant began working for respondent in 1999. Prior to that time, claimant had suffered a right shoulder dislocation while in the military. That injury led to shoulder surgery. After coming to work for respondent, claimant suffered two injuries to the same shoulder. In 2003, claimant dislocated his right shoulder but was able to independently reduce the shoulder without need for medical treatment. In 2004, claimant suffered a fall at work and dislocated the right shoulder again. This time medical treatment was required and a workers compensation claim was filed. Claimant returned to his regular job but was cautious in performing his job. No doctor recommended surgery to his shoulder after either of these work-related injuries. The only treatment required from the previous work injuries was the reductions. However, claimant was restricted to no lifting over 20 pounds over his head after the 2004 accident.

The March 26, 2008, accident occurred when claimant slipped on ice and fell. The right shoulder was again dislocated and reduction at the Overland Park Regional Medical Center was required. Claimant acknowledged that he had ongoing problems with the right shoulder from 2004 through the 2008 accident. However, after the 2008 accident, surgery beyond a simple reduction was being recommended.

The matter went to preliminary hearing on October 20, 2008, at which time the ALJ referred claimant to orthopedic surgeon Lowry Jones, Jr., M.D., for an evaluation and opinion regarding claimant's need for surgical treatment, and the necessity for that surgery. Dr. Jones, in his report of November 6, 2008, stated that the injury in 2008 caused significant permanent aggravation of claimant's previous disease process resulting in the need for further evaluation and surgical treatment. The report also noted that claimant's restrictions had been modified to allow lifting to chest level up to 20 pounds, but no overhead lifting was allowed. Dr. Jones authored a second report on December 29, 2008, at which time he stated that claimant's re-dislocations had led to increased disability and instability in the shoulder. He noted, however, that the work-related injury of 2008 would not have resulted in a dislocation had it not been for claimant's previous history and instability. Further treatment would involve soft tissue reconstruction, which Dr. Jones predicted would likely result in moderate loss of range of motion.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[5]

Respondent does not deny the accident of March 26, 2008, is a compensable incident. Respondent simply places the entire responsibility for the injury and resulting need for surgical treatment on the prior injuries, with no responsibility on the 2008 fall and

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[1] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2007 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

dislocation. Here, respondent is correct that there is a connection between the current need for surgery and the prior disability suffered by claimant. However, the need for surgery is not exclusively from the prior disability. The injury on March 26, 2008, resulted in greater restrictions being placed on claimant and a need for surgery, not previously recommended from the 2003 or 2004 injuries.

In *Logsdon*,[6] the Kansas Court of Appeals stated:

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

But the ruling in *Logsdon* does not insulate a respondent from a later injury, even with the aggravation of a preexisting condition. The respondent remains responsible for the accidents which occur while a worker performs labors.

Here, the injury of March 26, 2008, was a traumatic event resulting in more restrictive limits on claimant's ability to work, and also created the need for significant surgical treatment well beyond anything previously recommended during claimant's employment with this respondent.

This Board Member finds that claimant's current need for medical treatment, including possible surgery, is the result of the fall on March 26, 2008. Therefore, the Preliminary Decision of the ALJ should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[6] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 3, 128 P.3d 430 (2006).

[7] K.S.A. 44-534a.

CONCLUSIONS

Claimant suffered an injury on March 26, 2008, while working for respondent. The result of that accident is a recommendation for new restrictions and the need for a new surgery, both at least partially the result of the March 26, 2008, fall.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated February 5, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2009.

HONORABLE GARY M. KORTE

c: Michael J. Joshi, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent
Marcia L. Yates Roberts, Administrative Law Judge